Editor's note: Erratum issued Dec. 14, 1999. Pages 349 and 350 were transposed in original. Correction made in this document.

MARY D. HANCOCK, ET AL.

IBLA 98-283 Decided September 30, 1999

Appeal from a decision of the Arizona State Office, Bureau of Land Management, denying application for patent correction. AZA-30657.

Reversed in part, set aside in part, and remanded.

1. Federal Land Policy and Management Act of 1976: Correction of Conveyance Documents--Patents of Public Lands: Corrections

   Under section 316 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1746 (1994), the Secretary has authority to correct errors in patent documents at any time correction is deemed necessary or appropriate. However, in correcting errors under this statutory authority, only mistakes of fact may be corrected, not mistakes of law.

2. Federal Land Policy and Management Act of 1976: Correction of Conveyance Documents--Patents of Public Lands: Corrections

   Before action may be taken to correct a patent pursuant to 43 U.S.C. § 1746 (1994), the applicant for correction must show that an error in fact was made. Once the existence of an error in fact is shown, consideration may be given to matters of equity and justice which warrant amendment of the patent.

APPEARANCES: Michael E. J. Mongini, Esq., Flagstaff, Arizona, for appellants; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

On January 5, 1998, counsel for Mary D. Hancock et al. (appellants) 1/ filed a request with the Office of the Secretary seeking "reformation" of Patent No. 799032 (issued March 3, 1921) under authority of section 316 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1746 (1994).

A statement of the history of the matter will be helpful. In March 1915, Joseph E. Johnson settled on a homestead tract, establishing actual residence on the tract at that time. Between 1915 and 1919, he built a two-room house, barn, store room, corral, and two water tanks. He planted a 1-acre orchard and cultivated a garden, sudan grass, kaffir corn, cane, and milo maize. He put 107 acres under fence.

On October 31, 1916, Johnson filed a homestead entry describing a 107.5-acre tract as follows: " SW¼NW¼NE¼SE¼, W½SW¼NE¼SE¼, NW¼NW¼SE¼SE¼, SW¼SE¼, SE¼NW¼SE¼, S½NE¼NW¼SE¼, S½SE¼SW¼, S½NE¼SE¼SW¼, SE¼SW¼SW¼, S½NE¼SW¼SW¼, and NW¼NE¼SW¼SW¼, Sec. 15, T. 18. N., R. 4 E., G&SR Meridian." This land description was plainly designed to describe lands at the foot of Loy Butte, a steep butte located to the north of the tract, omitting the butte. Unfortunately, it is not accurate. Our review of the description in connection with location of the butte indicates that it should have described lands approximately 300 feet to the north and west of the lands it actually described. As a result of this evident error, the tract, as described, did not include the lands at the base of Loy Butte that Johnson was actively homesteading. Most significantly, it omitted the lands where he built his habitable house, as well as lands which he cultivated, both of which were essential to the successful establishment of a homestead. 2/

There is no apparent reason for this evident misdescription, other than failure to survey the property. 3/ The public land had been surveyed

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1/ The applicants were identified as Mary D. Hancock and Robert E. Willard (both on account of his own trust interest and ownership interest, and as principal representative for Minnie J. Willard). Mary D. Hancock is the principal owner of the patented lands.

2/ These facts are shown by Johnson's homestead final proof and are corroborated by Mary Hancock's statement that she placed a trailer on the foundation of the original homestead habitation and her recollection of what is known of the history of the homestead when she and her late husband acquired it in 1933. A private survey in 1990 showed an orchard and cleared pasture north of the patented tract, noting that sudan grass had previously been planted in the pasture area. We are also persuaded by the lack of any other evidence of any ruin that could have been Johnson's habitable house.

3/ Counsel for appellants states that Johnson relied on the General Land Office (GLO) plat of survey at the local land office. This is implausable, as the depiction of geographical features in the south portion of sec. 15 on the 1905 plat seems not to correspond with the actual position of Loy

in 1905 and sandstone markers were placed at section corners and quarter corners in the immediate vicinity of Johnson's tract. 4/ It appears that Johnson (or whoever assisted him in preparing his homestead entry form in 1916) made a simple mistake.

The mistake was perpetuated when final proof was filed in April 1920, and when the Final Certificate and Patent were issued. 5/ Johnson's homestead could not legally have been approved by the General Land Office unless he had a habitable house and cultivated ground on the tract he applied for. Since no one discovered that his house and at least part of his cultivated ground was within the boundaries of the tract he received patent for, it is evident that no formal survey of the tract was undertaken at any time prior to issuance of patent.

Following Joseph Johnson's death, appellant Mary Hancock and her late husband purchased the property in an Arizona estate auction in 1933. Again, no survey of the tract was made at that time, and the fact that substantial improvements were situated on lands outside the patented tract went unnoticed. The Hancocks continued to place improvements on lands outside the patented tract, assertedly relying on the depiction on a "Quadrangle map" showing that the patented property included improvements. The mistake was discovered in 1987 when the property was finally surveyed.

In June 1993, counsel for appellants wrote to the Secretary of the Interior requesting that he "correct the mistake of fact as to the legal boundaries of the land comprising the Hancock Ranch to include the improvements made by the Hancock's predecessors-in-interest, the Johnsons, as

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fn. 3 (continued)
Butte, so that it is unlikely that it could have been used to formulate the land description.

The current BLM plat clearly shows that "gap" between the patented tract and Loy Butte.

4/ During the 1905 survey of the area, sandstone markers were placed at the southeast and southwest corners and the south quarter corner (midpoint on the section line between secs. 15 and 22) of sec. 15. We find no basis for appellants' repeated assertion that the mistake could not be discovered "until the area was resurveyed by modern surveying standards." (June 1993 Application at 4.) When the area was resurveyed in 1958, the sandstone markers at section corners were found in the expected position, and were thus evidently available at all times. Any competent surveyor could have accurately described the tract in the 1920's.

5/ We note that Johnson's homestead entry was expanded in September 1917 with the addition of 50 acres to the south of and adjoining his earlier entry. Except insofar as they might be affected by a "shifting" of the patented lands to correct an error, those lands are not directly affected by this dispute.

well as those made by the Hancocks prior to the discovery of such mistake of fact." (June 1993 Request at 4.) As a result of this request, negotiations were instituted with the United States Forest Service (USFS), Department of Agriculture, which manages the surface of the unpatented lands as part of the Coconino National Forest, to determine whether the improved tracts could be patented via the "Small Tracts Act," but those negotiations had been unsuccessful because the value of the lands exceeds a statutory limit. On January 5, 1998, the application for correction of patent under authority of section 316 of FLPMA, 43 U.S.C. § 1769 (1994), was resubmitted to the Secretary, who forwarded it to BLM for consideration.

On April 8, 1998, BLM issued its decision rejecting appellants' application. BLM noted that the land description entered by Johnson and/or his witnesses on all entry filings, proofs, and final affidavit, and the descriptions used by the GLO in opening orders and publications is the same land description which was patented to him. Further, it held, the lands on which Johnson had built his house were withdrawn by Proclamation 818, dated July 2, 1908, for the Coconino National Forest. BLM rejected the application for corrective patent "[b]ecause the homestead entry was properly conveyed in Patent No. 799032" and "because the land requested is not open to entry." This appeal followed.

[1] Under section 316 of FLPMA, "[t]he Secretary may make corrections of errors in any documents of conveyance which have heretofore been issued by the Federal Government to dispose of public lands." 43 U.S.C. § 1746 (1994). That authority is discretionary. 43 C.F.R. § 1865.0-1. Its exercise is an extraordinary remedy. Frank L. Lewis, 127 IBLA 307 (1993).

BLM ruled that the fact that the lands requested to cure the error in patent are not open to entry bars granting the application. The Court in Foust v. Lujan, 942 F.2d 712, 714 (10th Cir. 1991), expressly ruled that section 316 of FLPMA (unlike previous legislation which it replaced) "no longer requires the land's availability for entry to correct a patent." Thus, the fact that land needed to cure an error is not available for entry at the time the application for correction of patent is filed does not, as BLM held, preclude the granting of the application.

We conclude that the lands needed to cure the error were available at the time Johnson commenced his homestead entry in 1916. 6/ Those

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6/ In view of our holding that the lands needed to cure the error were available when the error was made here, it is unnecessary to consider at this time whether we must follow the Court's broad holding in Foust that "[a] finding that the Secretary * * * cannot correct a patent to include lands that were not subject to entry by the original patentee is not in accordance with the law." Foust v. Lujan, 942 F.2d at 714. We can foresee situations where it would be fundamentally unjust to allow a patentee entryman or his successors-in- interest to gain title to lands under the patent amendment authority that he could not have gained title to under the patent authority.

lands were withdrawn in 1916 and have apparently always been withdrawn. Nevertheless, those lands were subject to being opened for entry under authority of the Act of June 11, 1906, 34 Stat. 233, which directed that USFS' predecessor "list lands chiefly valuable for agricultural purposes, not needed for public purposes, and open them for entry and settlement under the homestead laws, with preference given to anyone who already occupied them." (BLM Answer at Ex. A-2.) Plainly, were it not for the error in Johnson's 1916 Homestead Entry (which improperly described the lands Johnson was occupying), the lands needed to cure the error (which Johnson unquestionably already occupied) would have been the ones that were opened to entry. Accordingly, BLM's ruling that the lands needed to cure the error are not available for transfer is reversed.

[2] BLM also failed to recognize that the patent correction authority under FLPMA may properly be used to correct errors such as the one made in the instant case. It is accordingly necessary to set aside its decision rejecting appellants' application for amendment and remand the matter for consideration of whether relief can be granted, taking into account the following.

Errors in patents are defined as follows:

> [T]he inclusion of erroneous descriptions, terms, conditions, covenants, reservations, provisions and names or the omission of requisite descriptions, terms, conditions, covenants, reservations, provisions and names either in their entirety or in part, in a patent or document of conveyance as a result of factual error. This term is limited to mistakes of fact and not of law.

43 C.F.R. § 1865.0-5(b). Moreover, it is established that this authority is also available to BLM to correct errors that result in a party receiving title to the wrong lands. Specifically, it may be used where a homestead patent omits lands that the entryman entered and which served as the basis for his homestead, provided that concerned administrative agencies do not object, the Government's interests are not unduly prejudiced, no third party's rights are affected, and substantial equities of the applicant will be preserved by the action. See generally Mantle Ranch Corp., 47 IBLA 17, 87 I.D. 143 (1980).

To show entitlement under 43 U.S.C. § 1746 (1994) to the extraordinary remedy of correction of a patent, an applicant must show both that there was an error in fact that requires correction and that considerations of equity and justice favor such correction. Frank L. Lewis, 127 IBLA 307, 310-11 (1993); George Val Snow (On Judicial Remand), 79 IBLA 261, 262 (1984). We stated as follows in Snow:

> The statute provides that the Secretary may correct patents in order to eliminate error. The first obligation of an applicant for amendment of a land description in a

> patent, then, is to establish that the description is in fact erroneous. Without a clear showing of error, the Secretary is not empowered to exercise his statutory discretion to favor or disfavor the application.

79 IBLA at 262. As discussed above, we concluded that an error of fact has been established here. As in Mantle Ranch Corp., supra, the conclusion that an error was made is compelled by the fact that an entryman would not complete his legally-required improvements on lands and then apply for other lands. The narrow margin by which the lands were omitted also compels the conclusion that an error of fact occurred: the description of the lands was incorrectly entered on the homestead entry and subsequent documents. 7/

> The establishment of a cognizable factual error is not the end of the inquiry, however. As we stated in Snow: " Once the applicant has demonstrated the existence of error in the land description, his next obligation is to show that considerations of equity and justice favor the allowance of his application." 79 IBLA at 262. We noted that, where "the land described by the patent has been conveyed repeatedly by deed or inheritance over the course of several decades, and there is no discernable relationship or privity between the patentee and the most recent purchaser of the patented land, there is no apparent reason for the amendment of the patent," but, instead, the burden is on a remote purchaser of the property who applies for relief under section 316 of FLPMA to make showing of "equitable entitlement." Id. On remand, BLM should allow appellants the opportunity to establish such equitable entitlement in light of our analysis of the facts in Snow and the Court's analysis in Foust v. Lujan, supra, which have much in common with the instant situation.

It is also essential for BLM to consider whether USFS objects to granting the patent amendment. See Mantle Ranch Corp., supra. Appellants have filed a statement by the Coconino National Forest Supervisor suggesting that it has no objections, apparently providing that an Indian archeological site in question is preserved in Federal ownership. 8/ As noted below, that may not occur if the patent is corrected to cure the error.

7/ We reject BLM's assertion that there must have been a "mutual" mistake by both the patentee and the Government. We find no such requirement in the governing statute or regulation. The Court in Foust v. Lujan, 942 F.2d 712, 715 (10th Cir. 1991), observed that "[i]f both the United States and [the patentee] intended that the land on which Smith built be conveyed to him but were mistaken about the boundaries or legal description, this would be a correctable mistake of fact." That statement does not exclude the possibility that a unilateral mistake of fact would also be grounds for correction. We recognized a unilateral mistake of fact by the patentee in Mantle Ranch Corp., supra.

8/ The record shows the site is approximately 0.56 acres just to the north of S½NE¼SE¼SW¼, sec. 15, such that shifting the parcel to the north and west to cure the apparent error would result in the patenting of the site to appellants.

It is important that the parties recognize that the nature of the relief granted under section 316 of FLPMA is that the error in the patent will be corrected. In this case, that would be done by "shifting" the land granted by the patent. However, it must still retain its "shape" and cover 157.50 acres, as there is no evidence that those elements of the patent were arrived at by error in 1916. See George Val Snow, 46 IBLA 101, 106-07 (A.J. Burski concurring) (vacated on judicial remand, George Val Snow (On Judicial Remand), supra). Thus, approving the correction of the patent may result in the loss of title to the archeological site, as, but for the mistake in the land description, Johnson would have received title to that site. By the same token, it does not appear that shifting the patented land to correct the error will bring every improvement on the site into appellants' ownership. In these circumstances, the parties should take advantage of this remand to carefully consider whether a land exchange (which affords much greater flexibility) might better suit their respective interests.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is reversed in part, set aside in part, and remanded to BLM for action consistent with this decision.

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James P. Terry
Administrative Judge

I concur:

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David L. Hughes
Administrative Judge